Filed 6/8/04

CERTIFIED FOR PARTIAL PUBLICATION*

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. MANOLITO PESCADOR, Defendant and Appellant.	C042759 (Super. Ct. No. SF084959A)

APPEAL from a judgment of the Superior Court of San Joaquin County, George J. Abdallah, Jr., J. Affirmed as modified.

Scott Concklin, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Senior Assistant Attorney General, Matthew L. Cate, Supervising Deputy Attorney General, Jennifer M. Runte, Deputy Attorney General, for Plaintiff and Respondent.

---

* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of the Factual and Procedural Background and parts I, II.C., II.D., II.E., III, and IV of the Discussion.

Suspecting his wife, Norma Pescador, of infidelity, defendant Manolito Pescador fired 10 nails into her head with a nail gun, killing her. An information charged defendant with murder. (Pen. Code, § 187.)[1] The information also alleged defendant used a deadly weapon, the nail gun. (§ 12022, subd. (b)(1).) A jury found defendant guilty of murder and found the allegation true. Sentenced to 26 years to life, defendant appeals, contending: (1) the failure of the substitute trial judge to fully review the transcript deprived defendant of his right to a jury trial; (2) instructional error; (3) ineffective assistance of counsel; and (4) commentary by the trial court must be stricken from the abstract of judgment. The People concede the last contention and, in the unpublished portion of this opinion, we remand for a correction of the abstract of judgment. In all other respects, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

An information charged defendant with murder and alleged he used a deadly weapon. (§§ 187, 12022, subd. (b)(1).) Defendant entered a plea of not guilty.

A jury trial followed.

The Murder

Defendant lived in Stockton with Norma, his wife, their adult son Jeffrey, and two minor children. Norma was not

---

[1] All further statutory references are to the Penal Code unless otherwise indicated.

working because she had been in a car accident. Defendant worked in building maintenance, but in the months before the murder he had been renovating the house the couple had recently purchased.

One day in December 2001, as Jeffrey prepared to leave for work, defendant told him to take care of his younger siblings. Jeffrey testified he did not think the request unusual. Not long after, defendant called Jeffrey at work and told his son he had shot Norma with a nail gun, killing her. Defendant told Jeffrey that Norma admitted being unfaithful and admitted abusing one of their children. Defendant said the children were better off with their mother dead.

Jeffrey testified his mother had no boyfriends and defendant had a problem with jealousy. Norma never mentioned suicide. Jeffrey observed his father slap or push Norma on three separate occasions after the family relocated to Stockton. Defendant did not hit her with his fist.

The jury also heard the 911 call defendant made following the murder. Defendant stated he killed his wife with a nail gun. He said: "I kept going all, all, all, they're all over her head." Defendant continued: "She admitted that . . . somebody, that she had permissioned, uh, somebody to rape my, uh, step-daughter." Defendant said it was not an accident.

Charles Arellano, the first police officer on the scene, knocked on the front door. Defendant answered the door, covered in blood and holding Catholic rosary beads. Arellano asked defendant if he was hurt, and defendant replied: "No, I just

killed my wife. Go ahead and handcuff me." Arellano asked where defendant's wife was, and defendant replied: "She's in the back over there dead." When Arellano observed defendant later at the police station, defendant seemed distant.

Other officers arrived on the scene. In the kitchen, Officer Rodriguez found blood, strands of hair, a hair tie or "scrunchie," and a slipper. Rodriquez also found a nail gun. He found Norma lying on her back, dead. She had on a pair of pants but was nude from the waist up, with a sweater or jacket covering her torso.

Other officers testified about a trail of blood between the front door and the kitchen and a bloody handprint on the wall. Tools and building materials inside the house revealed a remodeling project was under way. A nail gun, attached by a hose to an air compressor, was found near the body and was later determined to be the tool used in the killing. The officers found Norma in the laundry room with multiple nails protruding from her head.

Another officer, Michael Ward, arrived to find defendant covered in blood and seated in the back seat of a patrol car. Ward asked defendant if he was injured; defendant replied, in a monotone, "This is my wife's blood."

Defendant told another officer he did not want to leave until he could tell Jeffrey he had killed Norma. Defendant wanted to tell Jeffrey he would have to take care of the house. Defendant told another officer, "I killed my wife. I killed my wife."

Jeffrey arrived frantic and upset and began to run toward the house. Officers physically restrained him. Defendant pleaded with officers to allow him to tell Jeffrey he had killed his mother. Defendant became upset when officers refused to let him speak to his son.

The Autopsy

A forensic pathologist testified Norma's autopsy revealed multiple puncture wounds from nails penetrating her skull. The pathologist recovered 11 nails: one stuck in Norma's hair, eight from her skull, and two from inside her brain. Three nails were in the temple area. These three nails penetrated the brain, causing death.

The autopsy also revealed some minor bruising to Norma's arms and legs. The bruising might have been the result of Norma's attempting to ward off blows, but there was no proof the wounds were defensive.

The pathologist testified Norma might have remained conscious and capable of walking and talking for some period after the three nails entered her brain. None of the wounds would have been instantly lethal. The pathologist stated the cause of death as brain injury caused by multiple penetrating nail gun wounds.

Prior Domestic Abuse

Several witnesses testified regarding prior incidents of abuse by defendant against Norma. Deborah Cott, a University of California, Davis Medical Center social worker, interviewed Norma approximately six weeks prior to her death. Norma entered

the emergency room with "road rash" injuries over a good portion of her body. Norma told Cott that defendant, while driving down the freeway, began to berate her, accusing her of being a bad wife. Defendant told her it was time to die. Norma believed defendant was going to kill her, so she jumped out of the speeding car. Norma appeared very upset and frightened.

During Norma's hospital stay, defendant came into her room and took her purse. Norma asked for it back, but defendant said: "I'm going to take this." Defendant approached Norma and put his hand on the road rash on her face, causing her to recoil in pain. Cott intervened and summoned the hospital police. After defendant refused to leave, officers escorted him out.

Michael Mason, a University of California, Davis police officer, interviewed Norma in the emergency room. Norma, covered with scratches and abrasions, appeared frightened. Norma told Mason defendant picked her up from work and began driving down the freeway at 70 miles per hour. Defendant angrily accused Norma of having a boyfriend. He sped up to 100 miles per hour despite Norma's pleas to slow down. Defendant continued to speed up and slow down, telling Norma they were both going to die.

Norma made no reference to suicide. She told Mason she loved defendant and did not want to get him in trouble. Norma directly appealed to Mason not to pursue the matter. She also told the officer that defendant had struck her on two prior occasions approximately three weeks before the incident.

The Sacoco family lived next door to defendant's residence. Noe Sacoco, the father, socialized with defendant, drinking beer and talking about defendant's home renovations. The duo also discussed domestic violence, because Noe had his own history with domestic abuse. Noe saw the same problems in defendant, who possessed some of the same attitudes about women. Defendant once told Noe he thought Norma was having an affair. On another occasion, Norma, bruised and crying, came to speak with Noe's wife.

Norma told the Sacocos about the incident on the freeway. She said she feared defendant. After Norma's death, Noe told officers Norma had come to their home three times, crying and upset. Thrice Norma told Noe defendant was threatening to kill her.

Noe's 14-year-old twin daughters also testified. The day before Norma's death, the twins saw Norma sitting in their backyard, crying. Norma told them defendant cut up all her credit and identification cards. Defendant constantly accused her of having affairs. Fearing for her life, Norma hid all the knives and sharp objects in the house. Norma told the twins she believed defendant would kill her.

Elizabeth Hawkins, another neighbor, also testified. One evening Hawkins heard screaming and saw defendant and Norma coming down the driveway. Defendant pulled Norma's hair and slapped her in the face. Norma screamed and tried to get away. Defendant said: "[Y]ou're my wife and you're not going to leave me. If you leave me, I'll kill you."

Another neighbor testified she saw Norma twice with black eyes about a month before the murder.

Expert Testimony

Richard Ferry, an expert on battered women's syndrome, also testified. According to Ferry, the syndrome is a collection of effects resulting from various types of behavior, including violence, in an intimate relationship. The batterer often imposes isolation; financially exploits the victim; turns the children against the victim; and emotionally abuses, threatens, and physically abuses the victim. The victim becomes depressed and consumed by helplessness. Learned helplessness is a survival device, a method of accommodating the abuse. The victim often undergoes a traumatic bonding to the abuser, identifying with the abuser and believing the abuse justified.

Ferry also commented on the phenomenon of abuse victims recanting their accusations against their abusers. Such recantation is extremely common: out of 60 cases Ferry participated in, 57 victims recanted to some degree. Victims recant out of a desire to hold the family together, for financial reasons, as a result of threats, or because they do not believe anyone can help them.

Ferry noted victims often confide in neighbors as opposed to authorities. They also frequently instruct their children not to report the abuse.

After the prosecution described the prior abuse incidents in the present case and Norma's response, Ferry opined that Norma likely suffered from battered women's syndrome. Ferry

also testified the abuser in such a situation can premeditate and deliberate prior to killing a spouse. However, domestic violence can also result from automatic behavior lacking in self-control.

Defense Case

Defendant testified in his own behalf. The couple married in the Philippines. They moved to Hawaii but later separated when defendant had an affair. Defendant moved to California, leaving the family in Hawaii. The family later rejoined defendant in California.

Beginning in May 2001, defendant began to suspect Norma of having an affair. Defendant noticed her acting suspiciously, hiding phone calls, and neglecting their children. Defendant began questioning Norma about an affair.

Defendant provided his version of the incident on the freeway. According to defendant, during the drive neither mentioned an affair or jealousy. Instead, the couple engaged in normal banter about their newly purchased home. Without saying a word, Norma suddenly jumped out of the speeding car.

On two occasions prior to the day of the murder Norma called the police because of domestic violence.

The morning of the murder, defendant awoke feeling nervous, convinced Norma was having an affair. Defendant found a footprint near the front door and a cigarette butt in an ashtray. The butt was not a brand defendant smoked. After Norma left to drive the children to school, defendant found

their daughter's blood-stained panties in the laundry basket. Defendant thought someone had molested their daughter.

Defendant waited for Jeffrey to leave before confronting Norma with his suspicions. He told Jeffrey to take care of the children since defendant intended to return to Hawaii if his suspicions about Norma were confirmed.

After Jeffrey left, defendant asked Norma to sit down and talk. Defendant asked about the bloody panties; Norma said she knew nothing about it. He repeatedly asked if she was having an affair. After her initial denials, Norma began to cry and admitted she was having an affair. She told defendant she was two months pregnant by another man.

Upset, defendant went outside to smoke and calm down. While outside, defendant heard a series of "poof, poof" noises. He threw down his cigarette and ran inside. Defendant found Norma lying in the laundry room in a pool of blood. Norma had removed her dress.

Defendant thought Norma committed suicide because of the affair. He "went totally blank." Defendant asked Norma why she shot herself in the head, and he offered to call 911. Norma said she was dirty and wanted to die. Defendant denied firing the nail gun.

Defendant testified he blanked out after Norma confessed to the affair and the pregnancy. Defendant took Norma's clothes and laid them on top of her. He held her hand and told her he would call 911. Defendant took rosary beads and a statue of the Virgin Mary out of Norma's hand.

Following his arrest, defendant admitted to both his son and officers that he shot some nails into Norma's head. At trial defendant admitted he killed Norma. He testified Norma said she wanted to die and he shot her repeatedly in the head with the nail gun. During cross-examination, the prosecution asked defendant whether he killed Norma intentionally or accidentally. Defendant replied, "I really don't know because I told you I had a blackout. I didn't really know what happened."[2]

Defendant also presented testimony by others who witnessed the freeway incident. Another driver, traveling the same freeway, saw Norma open the door, jump out of the car, and roll off to the side of the road. The driver pulled over, attempted to call 911, and ran back to Norma. Norma was only concerned about her purse, which other drivers retrieved.

Nick Brunelli, a California Highway Patrol officer, was dispatched to the scene. He arrived to find Norma lying on the shoulder of the road. Norma told Brunelli her husband told her "she was a bad wife. She wanted to end her life, so she undid her seat belt and jumped out of a moving vehicle." Norma told Brunelli she wanted to die.

The Verdict and Sentencing

The jury found defendant guilty of first degree murder and found he used a deadly weapon within the meaning of

---

[2] Defendant also testified Norma did not tell him she had given someone permission to rape their stepdaughter, even though that is what he told the 911 operator.

section 12022. The court sentenced defendant to 25 years to life plus one year for the deadly weapon enhancement. Defendant filed a timely notice of appeal.

DISCUSSION

I. Substitution of Trial Judges

During the trial, the original trial judge became ill and the parties agreed trial could proceed with a substitute judge. On appeal, defendant contends the substitute trial judge failed to review the transcript of the prior proceedings, depriving defendant of a fair trial.

Background

Trial began on August 5, 2002. Judge Mason Fenton heard pretrial motions in limine and presided over jury selection. With Judge Fenton presiding, 18 prosecution witnesses testified over three days of trial.

On August 20, 2002, Judge George Abdallah informed the jury that Judge Fenton was ill and the jury would be excused. Judge Abdallah continued the trial in anticipation of Judge Fenton's return.

On August 27, 2002, Judge Abdallah informed the jury that Judge Fenton's hospitalization appeared indefinite. The parties agreed that Judge Abdallah would be substituted as trial judge pursuant to section 1053.

Upon substitution, Judge Abdallah informed the parties: "I looked through the file yesterday . . . in an attempt to be prepared for today, and in doing so, I looked to see if there were any in limine motions I need to be -- and -- and rulings

based on those motions that I need to be aware of." During trial Judge Abdallah stated he had reviewed Judge Fenton's notes.

As the trial progressed, Judge Abdallah noted: "The first thing I did when I obtained this file was attempt to learn through the court reporter, the file itself, any minute orders of any in limine rulings." He also asked counsel if they knew of any other previous rulings of which he was unaware.

At one point in the proceedings, the admissibility of an incident in which defendant struck Norma with a mop handle became an issue. Defendant objected, arguing a ruling by Judge Fenton on an in limine motion barred the evidence. Judge Abdallah stated: "Gentlemen, while you're investigating [another] issue, may I take a moment then to step down and read that portion of Judge Fenton's ruling?" He later observed: "I have had an opportunity to review the discussion that took place on the record after the young witness had testified with regard to, as Judge Fenton indicated, some instrumentality that was used by defendant."

Judge Abdallah then made comments that defendant claims reveal the judge's failure to review the transcripts: "Thank you for your patience, ladies and gentlemen. We were again working on some issues that did not involve your duties as jurors. And unfortunately, and as you may have imagined, I am not aware of all of the evidence and the things that occurred in the earlier days of the trial. [¶] I received the trial very late in its proceedings and I simply did not have time to read

or . . . attempt to read the transcripts of . . . the proceedings that took place over the days and days. You can imagine how long that would have taken. [¶] So the lawyers had to educate me to some degree as to what had occurred, at least in part, in earlier days so that I could make some rulings in this case, ladies and gentlemen, so that's among the reasons for the delays."

Later that day, Judge Abdallah observed: ". . . I have reviewed a portion of the transcripts and I cannot tell the full extent and nature of the in limine motion." The next day, he requested that the court reporter retrieve prior testimony. Later, Judge Abdallah stated: "Gentlemen . . . I had an opportunity to review the testimony of the two girls, the neighbor girls." Based on his review of the prior testimony, Judge Abdallah made a ruling as to prior incidents of domestic violence. Judge Abdallah presided over the remainder of the trial.

Analysis

Section 1053 provides in pertinent part: "If after the commencement of the trial of a criminal action or proceeding in any court the judge or justice presiding at the trial shall die, become ill, or for any other reason be unable to proceed with the trial, any other judge or justice of the court in which the trial is proceeding may proceed with and finish the trial . . . ."

Defendant concedes he agreed to the substitution of Judge Abdallah and does not challenge replacement of Judge Fenton.

Instead, defendant contends: "A presiding judge who is ignorant of what has occurred during a significant portion of the trial cannot function as a competent trial judge, and it is structural error for him to proceed with the remainder of the trial in ignorance of what went on beforehand."

Defendant argues that to exercise the power of judicial discretion, all material facts and evidence must be both known and considered together with legal principles essential to a just decision. (*People v. Lara* (2001) 86 Cal.App.4th 139, 165.) According to defendant, "It should be axiomatic, therefore, that a substitute trial judge who joins a trial midway, but who is ignorant of all that has gone on before he arrived, cannot properly exercise informed discretion in presiding over the remainder of the trial. Without knowledge of all of the evidence previously adduced, and all proceedings previously heard, the substitute trial judge cannot exercise informed discretion, and hence, cannot properly function as a trial judge."

There are at least two flaws in defendant's argument. First, defendant never objected to Judge Abdallah's consideration of the case. Defendant asserts he had "no reasonable opportunity to make a timely objection. When Judge Abdallah took the bench, he did not announce his intention to preside over the balance of the trial without first reading the transcripts of what went on beforehand. Having not been told otherwise, [defendant] had the right to presume that the official duties of the court would be regularly performed."

Whatever presumption of regularity might have obtained at the outset of proceedings, nothing prevented defendant from objecting *during the proceedings* to the judge's failure to read the entire transcript. Defendant's opening brief contains three examples of instances in which he claims Judge Abdallah's partial reading of the record prevented the judge from properly exercising his discretion. However, during trial, defendant never voiced any concerns over Judge Abdallah's decision to familiarize himself with pertinent portions of the transcript as needed to make specific rulings rather than reading the entire transcript of prior proceedings at the outset of his substitution. His failure to object at trial is a forfeiture of any error. (See *People v. Saunders* (1993) 5 Cal.4th 580, 589-590.) Moreover, even if he had objected, there was no error.

Defendant mischaracterizes the record. Judge Abdallah was not "ignorant" of the prior proceedings. Our review of the record reveals Judge Abdallah took pains to acquaint himself with pertinent portions of the record as necessary. He reviewed the record as well as Judge Fenton's file and notes. Defendant offers no convincing authority for the proposition that a substituted judge must read every word of the earlier proceedings in order to afford defendant his constitutional rights.

People v. Espinoza (1992) 3 Cal.4th 806 (*Espinoza*), relied on by defendant, is distinguishable. In *Espinoza*, the defendant applied for a modification of a jury's death penalty verdict. The defendant argued the substitute judge's failure to hear all

the guilt phase testimony prevented him from exercising his independent judgment on the evidence for the purpose of ruling on the defendant's application. (*Id.* at pp. 828-829.) The Supreme Court disagreed, noting the substitute judge had reviewed the transcripts of the prior proceeding and could reweigh the aggravating and mitigating evidence to determine whether the weight of evidence supported the jury verdict. (*Id.* at p. 830.)

While the judge in *Espinoza* read the transcripts of all prior testimony, *Espinoza* does not stand for the proposition that a substituted judge must always read the entire transcript of the prior proceedings. *Espinoza* addressed only the narrow circumstance of a substitute judge's ability to rule on a defendant's motion to modify a death penalty verdict.

Defendant argues Judge Abdallah's alleged failure to read the trial transcript in its entirety constitutes structural error and is reversible per se. Defendant analogizes his situation with that of the defendant in *People v. Thurmond* (1985) 175 Cal.App.3d 865 (*Thurmond*). In *Thurmond*, the appellate court found a judgment must be reversed if the trial judge slept through portions of the testimony. According to defendant, "The same is true of the substitute judge who take[s] the bench midtrial without reviewing trial transcripts. He is as unconscious of the prior proceedings as the sleeping judge."

Again, defendant mischaracterizes the record. Judge Abdallah did not preside over the remainder of the trial in complete ignorance of all that had gone on before. In no sense

was Judge Abdallah "asleep at the wheel": he familiarized himself with pertinent portions of the record before ruling on any specific jury instructions or objections to the evidence. Defendant makes no effort to identify specific rulings by Judge Abdallah and demonstrate how the judge's failure to read the entire transcript of the earlier proceedings affected the rulings, nor has he demonstrated that the judge's overall performance was affected by such failure. Even in the absence of such a showing, he insists that a judge, substituted into a trial following three days of testimony, cannot fairly and competently preside without first reading all prior testimony. We are not persuaded.

II. Instructional Error

A. CALJIC Nos. 8.71 and 8.72

Defendant challenges CALJIC Nos. 8.71 and 8.72, arguing these instructions violate his due process rights by allowing a jury to make a determination of guilt on an element of the crime where one or more jurors may have had reasonable doubt. Defendant contends the instructions force individual jurors who had a reasonable doubt as to the degree of murder (CALJIC No. 8.71), or as to whether the crime was murder or manslaughter (CALJIC No. 8.72), to conclude they may not give the defendant the benefit of the doubt in reaching their own individual determinations as to the degree of the offense. The juror may only do so, defendant contends, if the jury collectively and unanimously agrees upon the existence of reasonable doubt. According to defendant, "If but one juror finds first degree

murder beyond a reasonable doubt, then there is no unanimity, and by the terms of the instruction, the others are precluded from giving defendant the benefit of the doubt in reaching their determinations."

CALJIC No. 8.71, as given, states: "If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a defendant, but you unanimously agree that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree."

CALJIC No. 8.72, as given, states: "If you are convinced beyond a reasonable doubt and unanimously agree that the killing was unlawful, but you unanimously agree that you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of that doubt and find it to be manslaughter rather than murder."

CALJIC No. 8.71 explains the process jurors must go through to determine the degree of murder. Under CALJIC No. 8.71, if the jury unanimously has a reasonable doubt as to whether the murder is of the first or second degree, they must return a verdict of second degree murder. CALJIC No. 8.72 states if the jury finds an unlawful killing but there is doubt whether it is murder or manslaughter, they must give defendant the benefit of the doubt and find the killing manslaughter.

As defendant correctly summarizes, CALJIC No. 8.71 requires the jury to find second degree murder if they are convinced

beyond a reasonable doubt and unanimously agree that defendant committed a murder, but unanimously agree they have a reasonable doubt as to the degree. However, defendant asserts CALJIC No. 8.71 eliminates the presumption that murder is of the second degree by stating that a defendant is entitled to the benefit of the doubt as to degree only if the jury unanimously agrees there is reasonable doubt in the first place. "In other words, before jurors may give the defendant the benefit of the doubt, they must first unanimously agree that there is a reasonable doubt."

Defendant's argument flies in the face of CALJIC Nos. 17.11 and 17.40, also given by the court. CALJIC No. 17.11, as given, states: "If you find the defendant guilty of the crime of murder, but have a reasonable doubt as to whether it is of the first or second degree, you must find him guilty of that crime in the second degree." CALJIC No. 17.40 provides: "The People and the defendant are entitled to the individual opinion of each juror. [¶] Each of you must consider the evidence for the purpose of reaching a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors. [¶] Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision. [¶] Do not decide any issue in this case by the flip of a coin, or by any other chance determination." In addition, the court instructed the jury to "[c]onsider the instructions as a whole and each in light of all the others."

We determine the correctness of jury instructions from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. (*People v. Burgener* (1986) 41 Cal.3d 505, 538.) We also presume that the jury is capable of following the instructions as given. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1337.)

We find the court properly instructed the jury. We note the Supreme Court has consistently upheld the validity of CALJIC Nos. 8.71 and 8.72. (*People v. Dennis* (1998) 17 Cal.4th 468, 536-537; *People v. Morse* (1964) 60 Cal.2d 631, 656-657.) In light of the instructions as a whole, the jury did not misinterpret CALJIC No. 8.71 as requiring them to make a unanimous finding that they had reasonable doubt as to whether the murder was first or second degree.

We find CALJIC No. 8.72 also properly given. CALJIC No. 8.72 requires the jury to find manslaughter if they are convinced beyond a reasonable doubt and unanimously agree the killing was unlawful but have a reasonable doubt as to whether the crime is murder or manslaughter. Defendant asserts, "Construed literally . . . this instruction tells individual jurors that they may not give the defendant the benefit of the doubt in reaching their own individual determinations in deciding between murder and manslaughter, but may do so only if the jury collectively and unanimously agrees upon the existence of reasonable doubt."

However, the court also instructed pursuant to CALJIC No. 8.50: "The distinction between murder and manslaughter is

that murder requires malice while manslaughter does not. [¶] When the act causing the death, though unlawful, is done in the heat of passion or is excited by a sudden quarrel that amounts to adequate provocation, the offense is manslaughter. In that case, even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent. [¶] To establish that a killing is murder and not manslaughter, *the burden is on the People to prove beyond a reasonable doubt each of the elements of murder* and that the act which caused the death was not done in the heat of passion or upon a sudden quarrel." (Italics added.)

CALJIC No. 8.72, when considered in context with CALJIC Nos. 8.50, 17.11, and 17.40, did not instruct the jury that it had to make a unanimous finding that they had a reasonable doubt as to whether the crime was murder or manslaughter in order for defendant to receive the benefit of the doubt. We find the court correctly instructed the jury pursuant to CALJIC Nos. 8.71 and 8.72.

B. CALJIC No. 2.50.02

Defendant challenges the constitutionality of CALJIC No. 2.50.02 (2000 rev.), arguing the instruction creates an unconstitutional permissive inference. Defendant contends the instruction improperly permitted the jury to rely on prior acts of domestic violence to infer that he had a propensity to commit premeditated murder and did, in fact, commit premeditated murder.

The 2000 revision of CALJIC No. 2.50.02, as given, states: "Evidence has been introduced for the purpose of showing that the defendant engaged in an offense involving domestic violence on one or more occasions other than that charged in the case. [¶] . . . [¶] If you find that the defendant committed a prior offense involving domestic violence, you may, but are not required to, infer that the defendant had a disposition to commit other offenses involving domestic violence. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime of which he is accused. [¶] However, if you find by a preponderance of the evidence that the defendant committed a prior crime or crimes involving domestic violence, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged offense. The weight and significance, if any, are for you to decide. [¶] You must not consider this evidence for any other purpose."

In *People v. Brown* (2000) 77 Cal.App.4th 1324, 1334-1337 (*Brown*), the court rejected an argument that this instructional language permits conviction by a standard of proof less than a reasonable doubt. However, defendant's initial contentions in this case are different. Thus, defendant contends the instruction was unconstitutional because the inferred facts, a disposition to commit crimes of domestic violence and likelihood that he did commit the charged offense, do not flow "more likely than not" from the proved fact, the prior incidents of domestic violence.

"The due process clauses of the federal Constitution (U.S. Const., 5th & 14th Amends.) require a relationship between the permissively inferred fact and the proven fact on which it depends." (*People v. Mendoza* (2000) 24 Cal.4th 130, 180.) Courts describe the standard for evaluating the relationship between the inferred fact and the proven fact as a "'rational connection,'" "'more likely than not,'" and "'reasonable doubt.'" (*Ibid.*) However, these seemingly disparate statements of the due process standard differ in language, not substance. (*Ibid.*)

The United States Supreme Court found a due process violation when it cannot be said "'with substantial assurance'" that the inferred fact is "'more likely than not to flow from the proved fact on which it is made to depend.'" (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 166, fn. 28 [60 L.Ed.2d 777, 797] (*Ulster County Court)*.) The Supreme Court has also held: "A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." (*Francis v. Franklin* (1985) 471 U.S. 307, 314-315 [85 L.Ed.2d 344, 353-354].)

Defendant presents a tripartite objection to CALJIC No. 2.50.02, arguing the instruction consists of a chain of three irrational inferences. "The first inference permits the jury to use the evidence of a prior act of domestic violence or abuse (not necessarily criminal) to infer that the defendant has a criminal disposition to commit crimes of domestic violence in

general. From there, the jury is permitted to draw a second inference, that the defendant is likely to commit the crime of which he is accused. The third irrational inference permits the jury to infer that he actually *did commit* that crime."

Defendant contends the first inference is irrational because it allows the jury to infer criminal propensities based on acts that are not necessarily criminal and that may even be legally justifiable. As the People point out, this argument overlooks the language of CALJIC No. 2.50.02, which states that "[i]f you find that the defendant committed *a prior offense involving domestic violence*, you may, but are not required to, infer that the defendant had a disposition to commit other *offenses involving domestic violence*." (Italics added.)

The instruction permits the jury to infer a propensity to commit domestic violence from prior domestic violence incidents, regardless of whether defendant was charged or convicted of the prior abuse. We disagree with defendant's assertion that the inference offends the due process clauses because it cannot be said "with substantial assurance" that the inferred fact is "more likely than not to flow from the proved fact on which it is made to depend."

Here, witnesses testified to several incidents of domestic violence perpetrated by defendant against Norma. Witnesses described defendant's pushing and slapping Norma, telling her it was time to die while speeding down a freeway, telling her he would kill her, causing bruises and abrasions, and threatening to kill her if she left him. We find "with substantial

assurance" that defendant's propensity to commit crimes of domestic violence is "more likely than not to flow" from the proved prior acts of domestic violence.

Next, defendant argues the second inference (if you find defendant had a disposition to commit other offenses you may infer he was likely to commit the charged crime) is irrational because domestic violence often involves automatic thinking rather than the premeditated murder the jury convicted him of. Defendant cites testimony by Richard Ferry, the prosecution's domestic violence expert, who testified domestic abusers often lack self-control.

Defendant conveniently overlooks other testimony by Ferry that a domestic violence batterer can premeditate and deliberate the murder of a spouse. Moreover, as defined by CALJIC No. 2.50.02, domestic violence includes abuse against a spouse, including intentionally or recklessly causing great bodily injury. Defendant's firing of nails into Norma's head constitutes domestic violence. Again, we find with substantial assurance that the inferred fact, defendant's murder of Norma, more likely than not flowed from the proved incidents of prior domestic violence.

Finally, defendant labels the third inference (if you find defendant had a disposition to commit other offenses you may infer he actually did commit the offense charged) irrational because there is no logical link between the two. We disagree.

Defendant murdered Norma with a nail gun. He threatened to kill Norma on several previous occasions in a variety of

situations. The conclusion that defendant actually murdered Norma with a nail gun is a logical inference derived from his numerous threats to kill her. We find CALJIC No. 2.50.02, in the present case, was neither illogical nor a violation of defendant's due process rights. We can say "'with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.'" (*Ulster County Court*, *supra*, 442 U.S. at p. 166, fn. 28.)

Defendant also asserts CALJIC No. 2.50.02 unconstitutionally undermines the presumption of innocence and the requirement of proof beyond a reasonable doubt. According to defendant, the instruction allows the jury to infer he committed the crime based solely on prior acts of domestic violence, negating the presumption of innocence.

Preliminarily, we note the California Supreme Court approved a similar instruction, which addresses admission of evidence of a defendant's prior uncharged sexual offenses, in *People v. Reliford* (2003) 29 Cal.4th 1007 (*Reliford*). For the purposes of evaluating the constitutional validity of the instructions, there is no material difference between CALJIC No. 2.50.01 and CALJIC No. 2.50.02. (*People v. Escobar* (2000) 82 Cal.App.4th 1085, 1097, fn. 7.)

In *Reliford*, the defendant criticized the instruction for failing to inform jurors that the inference they might draw from prior sexual offenses was simply one item to consider along with all other evidence in determining beyond a reasonable doubt that defendant had been proved guilty beyond a reasonable doubt of

the charged crime. (*Reliford*, *supra*, 29 Cal.4th at p. 1015.) The court rejected the challenge, finding: "By telling jurors that evidence of prior offenses is insufficient to prove defendant's guilt of the charged offenses beyond a reasonable doubt, jurors necessarily understand that they must consider all the other evidence before convicting defendant." (*Ibid.*)

CALJIC No. 2.50.02 contains a similar admonition that defendant's commission of prior crimes "is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged offense." In addition, the court instructed the jury with CALJIC No. 2.90, regarding the presumption of innocence and the burden of proof, and CALJIC No. 1.01, instructing the jury to view the instructions as a whole. We presume the jury followed the court's instructions. (*People v. Holt* (1997) 15 Cal.4th 619, 662.)

Finally, defendant asserts CALJIC No. 2.50.02 together with CALJIC No. 2.50.2 permits the jury to infer guilt based on prior acts proven by a preponderance of the evidence, undermining the beyond a reasonable doubt standard to be applied to the charged offense.[3]

---

[3] CALJIC No. 2.50.2 states: "'Preponderance of the evidence' means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to find that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it. [¶] You should consider all of the evidence bearing upon every issue regardless of who produced it."

As we have mentioned, this contention was rejected in *Brown*, *supra*, 77 Cal.App.4th at pages 1335-1337, an opinion with which we agree. Moreover, in *Reliford*, the Supreme Court faced a similar challenge to CALJIC No. 2.50.01. The court turned back the challenge: "We do not find it reasonably likely a jury could interpret the instructions to authorize conviction of the charged offenses based on a lowered standard of proof. Nothing in the instructions authorized the jury to use the preponderance-of-the-evidence standard for anything other than the preliminary determination whether defendant committed a prior sexual offense . . . . The instructions instead explained that, in all other respects, the People had the burden of proving defendant guilty 'beyond a reasonable doubt.' [Citations.] Any other reading would have rendered the reference to reasonable doubt a nullity." (*Reliford*, *supra*, 29 Cal.4th at p. 1016.)

Here, the court also instructed the jury the prosecution bore the burden of proving defendant guilty beyond a reasonable doubt. (CALJIC No. 2.90.) We find no error in the court's instructions.

C. CALJIC No. 8.40

Defendant argues the trial court erred in instructing the jury on voluntary manslaughter by incorrectly stating that an intent to kill is a necessary element of voluntary manslaughter. In support, defendant cites *People v. Lasko* (2000) 23 Cal.4th 101 (*Lasko*).)

Background

During jury instruction discussions, the parties considered and modified CALJIC No. 8.40. Unmodified, CALJIC No. 8.40 states, in pertinent part: "Every person who unlawfully kills another human being [without malice aforethought but] either with an intent to kill, or with conscious disregard for human life, is guilty of voluntary manslaughter in violation of Penal Code section 192, subdivision (a). [¶] . . . [¶] The phrase, 'conscious disregard for life,' as used in this instruction, means that a killing results from the doing of an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his or her conduct endangers the life of another and who acts with conscious disregard for life. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A human being was killed; [¶] 2. The killing was unlawful; and [¶] 3. The perpetrator of the killing either intended to kill the alleged victim, or acted in conscious disregard for life; and [¶] 4. The perpetrator's conduct resulted in the unlawful killing." (CALJIC No. 8.40 (2001 Rev.).)

The parties and the trial court discussed modification of the instruction. Defense counsel stated he did not intend to argue conscious disregard for human life, and consequently, the parties agreed to strike the language from the instruction.

Accordingly, the court gave CALJIC No. 8.40 as modified: "Every person who unlawfully kills another human being without malice aforethought but with an intent to kill, is guilty of

voluntary manslaughter in violation of Penal Code section 192, subdivision (a). [¶] There is no malice aforethought if the killing occurred upon a sudden quarrel or heat of passion. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A human being was killed; [¶] 2. The killing was unlawful; and [¶] 3. The perpetrator of the killing intended to kill the alleged victim, and [¶] 4. The perpetrator's conduct resulted in the unlawful killing."

In *Lasko*, the Supreme Court found intent to kill is not a necessary element of the crime of voluntary manslaughter, and therefore CALJIC No. 8.40 incorrectly requires an intent to kill. (*Lasko*, *supra*, 23 Cal.4th at pp. 110-111.) Defendant contends the instruction in the present case amounts to error under *Lasko.*

Discussion

Defendant is correct in observing that the modified version of CALJIC No. 8.40 given by the trial court is not a complete statement of the elements of manslaughter. "[A]n unlawful killing without malice (because of a sudden quarrel or heat of passion) is voluntary manslaughter, regardless of whether there was an intent to kill." (*Lasko*, *supra*, 23 Cal.4th at pp. 109-110.) The unmodified version of the instruction correctly explains that in the absence of malice, a killing, either with an intent to kill or with conscious disregard for human life, is voluntary manslaughter.

However, defendant's challenge to the instruction fails because the error, if any, was invited. As the Supreme Court

has explained, "[t]he doctrine of invited error bars a defendant from challenging an instruction given by the trial court when the defendant has made a 'conscious and deliberate tactical choice'" to request the instruction. (*People v. Lucero* (2000) 23 Cal.4th 692, 723.) Here, the language of the instruction was discussed and defense counsel declared he did not intend to argue conscious disregard for human life and agreed to strike the language from the instruction.[4] Given the state of the record, defense counsel's comment was unremarkable; neither the People nor defendant had presented evidence calculated to support a finding of conscious disregard. The modification thus removed one of the two alternatives for finding voluntary manslaughter on a theory that the killing resulted from a sudden quarrel or heat of passion. Having agreed to a modification of the instruction -- an agreement that was reasonable under the circumstances -- defendant cannot now complain that the court erred. The trial court was not required to anticipate that

---

[4] The following colloquy took place during jury instruction discussions. The prosecution: ". . . I've proposed striking '. . . or in conscious disregard of human life.'" Defense counsel: "Yeah, we can . . . I'm indifferent about that. I don't intend to argue conscious disregard for human life, and I think the D.A. does, so it can probably go. But then we need to strike the 'either' language, where it says '. . . either with an intent to kill or' -- [.]" The prosecutor: "Yes. I have the 'either' as being struck." Defense counsel: "All right. [¶] So then back up then, Judge, and then tell me if I'm going too fast for you. I get at this point, 'Every person who unlawfully kills another human without malice aforethought, but with an intent to kill, is guilty,' da-dah, da-dah, da-dah."

creative appellate counsel would disavow tactical decisions made by trial counsel.

We also note that defendant's claim is quite different from that considered by the court in *Lasko*. The defendant in *Lasko* argued the court's instructions required the jury to convict him of murder if it found he killed in a sudden quarrel or heat of passion but without the intent to kill; manslaughter was foreclosed. The court agreed, concluding "the presence or absence of an intent to kill is not dispositive of whether the crime committed is murder or the lesser offense of voluntary manslaughter." (*Lasko*, *supra*, 23 Cal.4th at p. 110.) The court explained that while most voluntary manslaughters "'are of the intent-to-kill sort'" (*ibid.*), it is also possible for a killing to constitute manslaughter if committed with extreme disregard for human life.[5] In the present case, defense counsel properly recognized that if defendant committed voluntary manslaughter, it was of an "intent-to-kill sort," and appropriately sought to tailor the instructions accordingly. Defendant cannot now complain.

---

[5] Ultimately, the court concluded any error was rendered harmless by other instructions on murder requiring the People to prove that the act that caused the death was not done in the heat of passion or upon a sudden quarrel. (*Lasko*, *supra*, 23 Cal.4th at p. 112.) The second degree murder verdict reflected the jury's belief the killing was not committed in the heat of passion.

D. Unconsciousness Defense

Defendant argues the court erred in failing to instruct sua sponte on the unconsciousness defense. Section 26 exempts from criminal responsibility persons who committed the act charged "without being conscious thereof." (*People v. Chaffey* (1994) 25 Cal.App.4th 852, 855.)

Defendant argues evidence adduced at trial supported the giving of the defense. After Norma's confession to having an affair, defendant went outside to calm down and heard "popping sounds." Defendant found Norma in a pool of blood and she told him she wanted to die. Defendant went "totally blank." He admitted killing Norma but could not recall firing the nail gun. When asked during cross-examination whether he fired the gun accidentally, defendant answered: "I really don't know because I told you I had a blackout. I didn't really know what happened."

The duty to instruct sua sponte on general principles of law closely and openly connected with the facts of a case includes an obligation to instruct on the defense of involuntary unconsciousness. Such a duty arises only where it appears defendant is relying on that defense or there is substantial evidence to support the defense and the defense is not inconsistent with defendant's theory of the case. (*People v. Ray* (1975) 14 Cal.3d 20, 25.)

The People argue defendant never relied on the defense of unconsciousness. We agree. Defense counsel's closing argument focused on defendant's lack of premeditation and his attempt to

assist Norma in committing suicide. Defense counsel sought to convince the jury defendant acted automatically in murdering Norma or was attempting to aid her in her desire to die.

Defense counsel explained defendant's "blanking out" as a reaction to a startling situation, a natural reaction to the events. This interpretation dovetailed with defense counsel's theory that defendant acted without due consideration, automatically and without thinking.

Similarly, a sua sponte instruction of unconsciousness would conflict with defendant's theory of the case. If defendant blacked out during the murder, he could not have assisted Norma in her desire to commit suicide. Nor could an unconscious defendant murder Norma in the heat of passion. We find the trial court did not err in failing to instruct sua sponte on unconsciousness.

E. CALJIC No. 9.35.1

Defendant contends CALJIC No. 9.35.1 contains erroneous provisions prejudicial to defendant. CALJIC No. 9.35.1 provides that in regard to battered women's syndrome evidence, the jury should consider the evidence for the limited purpose as proof relevant to the believability of the defendant's testimony. Defendant contends the instruction wrongly singles out his testimony and authorizes the jury to consider the evidence for an improper purpose. He also argues such evidence is relevant only when the defendant is a battered woman.

The court instructed the jury pursuant to CALJIC No. 9.35.1: "Evidence has been presented to you concerning

battered women's syndrome. This evidence is not received and must not be considered by you to prove the occurrence of the act or acts of abuse which form the basis of the crimes charged. [¶] Battered women's syndrome research is based upon an approach that is completely different from the approach which you must take to this case. The syndrome research begins with the assumption that physical abuse has occurred, and seeks to describe and explain common reactions of women to that experience. As distinguished from that research approach, you are to presume the defendant innocent. The People have the burden of proving guilt beyond a reasonable doubt. [¶] *You should consider this evidence for certain limited purposes only, namely, that the alleged victim's reactions, as demonstrated by the evidence, are not inconsistent with her having been physically abused, or* [¶] *the beliefs, perception or behavior of victims of domestic violence, or* [¶] *proof relevant to the believability of the defendant's testimony.*" (Italics added.)

Defendant argues evidence of battered women's syndrome (BWS) "has no relevance in determining 'the believability of the *defendant's* testimony,' unless the defendant is a battered woman, and then, only if there is a danger that the jury might apply popular myths and misconceptions to discount her testimony. BWS is not the study of how men behave, and it thus has no relevance in determining the believability of a man who is accused of battering a woman."

We disagree. Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that

is of consequence to the determination of the action." (Evid. Code, § 210.) The BWS evidence was relevant in determining Norma's actions and by extension the believability of defendant's characterization of those actions.

Here, defendant sought to portray Norma as guilt ridden by her adultery to the point of suicide. Part and parcel of this characterization was Norma's prior attempt to kill herself by jumping out of the car on the freeway. In support, defendant presented testimony by Officer Brunelli, who stated Norma confessed she attempted suicide by diving out of the car.

The People presented evidence on BWS through their expert Ferry. Ferry explained BWS often leads victims to recant or deny abuse. Norma's statements to the officer following the incident on the freeway are an instance of Norma's denial. The BWS evidence was relevant to a question central to this case: whether defendant murdered Norma or whether he assisted her in killing herself. We do not find the court erred in instructing pursuant to CALJIC No. 9.35.1.

III. Ineffective Assistance of Counsel

Defendant argues the prosecutor committed misconduct at trial by arguing that under CALJIC No. 2.21.2, if the jury found defendant's testimony false on any material point, the instruction "shifted the burden of proof to [defendant] [fn. omitted] to prove the truth of the remainder of his testimony by

a preponderance of the evidence, [fn. omitted] which could not be satisfied without corroboration. [Fn. omitted.]"[6]

Defendant argues defense counsel rendered ineffective assistance by failing to object to the prosecutor's misconduct. Defendant bears the burden of proving ineffective assistance of counsel by a preponderance of the evidence. A defendant claiming ineffective assistance of counsel must show that counsel's performance was both deficient and prejudicial, i.e., that it is reasonably probable counsel's unprofessional errors affected the outcome. If the record sheds no light on why counsel acted or failed to act in the challenged manner, we must reject the claim, unless counsel was asked for an explanation and failed to provide one, or there could be no satisfactory explanation for counsel's performance. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1014-1015.)

According to defendant, during closing argument the prosecution repeatedly urged the jury to apply CALJIC No. 2.21.2 in an unconstitutional manner. The prosecutor told the jury that if defendant's testimony was found to be false on any material point, CALJIC No. 2.21.2 shifts the burden of proof to

---

[6] The jury was instructed with CALJIC No. 2.21.2: "A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars."

defendant to prove the truth of the remainder of his testimony by a preponderance of the evidence.

Defendant cites several instances during closing argument in which the prosecutor discussed defendant's veracity. After reading CALJIC No. 2.21.2, the prosecutor stated: "Okay. Probability of truth. You have to . . . it's probably true what he said before you can believe any particular thing. Okay. That's kind of a shifting of the burden on someone else." The prosecutor reiterated: "You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless from all of the evidence you believe the probability of the truth favors his or her testimony in other particulars. Okay. Favors. That would kind of indicate more than 50/50. It has to favor. The probability has to be in favor of his having told the truth about that."

The prosecution later asked: "Where did that information come from? [Defendant.] [Defendant], whom you have to be very careful about. But you have to think that it's more than 50 percent likely that she tried to commit suicide that day to believe his statement. If you don't, then you should disregard it like the suggestion suggests."

We agree the prosecutor's statement concerning the burden shifting was confusing. The prosecutor, during his closing argument, was attempting to clarify CALJIC No. 2.21.2: "I'm not going to go back through all of these things, but suffice it to say, he lied, so, therefore, you have to judge his testimony by that instruction. You have to think that -- not just, 'Well,

it could have happened.' Before you can believe it, you have to believe that it probably happened. You have to believe that he -- that she probably said that to him. That it favors the probability of the truth."

As the prosecution points out, the Supreme Court rejected as ineffective assistance of counsel the failure of counsel to object to a far more egregious statement in *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1214-1215 (*Gonzalez*). In *Gonzalez*, the prosecution during closing argument stated: "'[t]he defense has to create a reasonable doubt . . . . The reasonable doubt has to be created by the defense. They have not created any reasonable doubt. Confusion, yes, but reasonable doubt, no.'" (*Id.* at p. 1214.)

The court in *Gonzalez* found the comment brief and ambiguous. In addition, the court found the jury received accurate standard instructions stating the People bore the burden of proving the defendant guilty beyond a reasonable doubt. Therefore, defense counsel's failure to object did not constitute ineffective assistance of counsel. (*Gonzalez*, *supra*, 51 Cal.3d at p. 1215.)

Here, the statement by the prosecution that CALJIC No. 2.21.2 results in "kind of a shifting of the burden" is even more ambiguous than the statement in *Gonzalez*. The evidence that defendant was guilty as charged was highly persuasive. We cannot say defense counsel's failure to object "undermine[s] confidence in the guilt verdict." (*Gonzalez*, *supra*, 51 Cal.3d at p. 1215.)

IV. Abstract of Judgment

Finally, defendant argues the abstract of judgment improperly contains commentary by the trial court and urges the abstract be modified. The People concede the abstract should be modified.

After pronouncing judgment, the trial court observed: "This is among the most heinous, cruel and vicious acts I have ever heard of, let alone been encountered with, in over 20 years working in the legal system. [¶] This is one of the most vicious, callous incidents of domestic violence that I have ever heard of occurring. It is the sincere hope of this Court that at any time you are considered for parole that those Parole Boards look carefully at the facts of this case, look at [the pathologist's] testimony alone, that will magnify for them the heinous quality of this crime, the great violence involved, the suffering this victim experienced, and that you be denied parole."

The abstract of judgment states: "The court indicated the sincere hope the parole boards would look carefully at the facts of this case and [the pathologist's] testimony that will magnify for them the heinous quality of the crime, the great violence involved and the suffering the victim experienced, and the defendant be denied parole."

Section 1213 requires an abstract of judgment executed in a form prescribed by the Judicial Council. (§ 1213.5.) The abstract is a legal instrument that enforces the judgment against the defendant. (*In re Black* (1967) 66 Cal.2d 881, 889.)

It is the order sending the defendant to prison and the process and authority for carrying the judgment and sentence into effect. (*Ibid.*) Although the abstract may state other orders, such as DNA testing, such other orders should only be those enforceable against the defendant. (*People v. Hong* (1998) 64 Cal.App.4th 1071, 1084.)

As defendant notes, and the People concede, the comments complained of are not part of the order that can be viewed as a component of defendant's sentence. Therefore, we remand the abstract of judgment to the trial court to strike the comments described above.

DISPOSITION

We remand for a correction of the abstract of judgment in accordance with this opinion. In all other respects, the judgment is affirmed.

RAYE, J.

We concur:

BLEASE, Acting P.J.

SIMS, J.